IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 82-5372

JACK MA,

Plaintiff-Appellant,

-vs-

THE COMMUNITY BANK,

Defendant-Appellee.

On Appeal from the United States Court of Appeals

for the Seventh Circuit

PRO SE JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED

The following questions are presented for review by this appeal:

(I) Whether the U.S. Court of Appeals and the U.S. District Court were correct in reaching the issue of entitlement to damages before examining the question of liability based on fraud, bad faith and conversion of defendant-appellee and whether the U.S. Court of Appeals was correct in not remanding the case to the U.S. District Court after it (Court of Appeals) found considerable evidence of bad faith on the part of defendant-appellee and in not directing the District Court to consider the award of punitive damages based on bad faith, fraud and conversion?

Answered in the affirmative by both Courts.

(II) Whether the finding that plaintiff-appellant is not entitled to punitive damages in an action in which he is entitled to a finding of fraud, bad faith and conversion against defendant-appellee is the same as the granting of zero damages after a finding of

entitlement to damages resulting in precluding review on this issue pursuant to Wisconsin law?

Answered in the affirmative by the U.S. Court of Appeals.

(III) Whether the U.S. Court of Appeals and the U.S. District Court were correct in denying plaintiff-appellant legal fees and litigation costs and other compensatory and consequential damages where a defendant is found guilty of fraud and bad faith and caused a case to become extraordinarily lengthy due to defendant's obstinate refusal to cooperate with discovery?

Answered in the affirmative by both Courts.

(IV) Whether the U.S. Court of Appeals and the U.S. District Court abridged plaintiff-appellant's rights to choice of legal counsel in the absence of a showing that plaintiff's nonresident counsel needed to obtain assistance of local counsel and whether such an order was frivolous and unwarranted in light of the fact that the District Court did not order plaintiff-appellant to replace local counsel after she withdrew and whether the U.S. Court of Appeals erred in affirming the lower Court's application of Local Rule 2.04 to plaintiff-appellant when the rule specifically applied to nonresident counsel and not a pro se litigant?

Answered in the negative by both Courts.

(V) Whether exigent circumstances comprising of ineffective counsel by reason of a conflict of interest because of conspiracy with plaintiff-appellant's adversary is sufficient grounds for granting plaintiff's request for a jury trial where said request was not timely filed, especially where the defendant-appellee would not be unduly prejudiced?

Answered in the negative by the U.S. Court of Appeals and the U.S. District Court.

JURISDICTION

The final judgment and opinion of the U.S. Court of Appeals for the Seventh Circuit was entered on June 8, 1982, pursuant to 28 U.S.C.

Section 1332. The Notice of Appeal was filed on July 19, 1982 in the U.S. Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendments V, VII and XIV.

STATEMENT OF THE CASE

On March 31, 1967, Jack Ma ("Ma") opened a savings account, #12398, with an initial deposit of $1,278.00 (Pl. Exh. #1), with the head teller of the defendant Bank, Mr. Gerald Gerbers ("Gerbers"). Gerbers observed Ma signing a signature card (Pl. Exh. #2), processed the account, approved the application, accepted the initial deposit and prepared the passbook.

Immediately following this transaction Ma asked Gerbers about a savings certificate of deposit ("SCD") and its safety (T.T., pp. 53 & 54) because of (1) Ma's concern in sharing a room in St. Norbert College's dormitory with another student whom he did not know and (2) the lack of locks on the drawers and closets in the room (T.T., p.54).

Ma asked Gerbers what Ma could do if the SCD were lost or stolen. Gerbers told Ma not to worry about that, since the SCD was non-negotiable (T.T., p.54). Gerbers also showed Ma a blank SCD, bearing the statement "NOT NEGOTIABLE" printed in bold face (T.T., p.55). Gerbers also stated that the Bank retained a copy of the SCD for its own records (T.T., p.55). If the SCD were lost or stolen, Ma should immediately report this to the Bank (T.T., pp.54 &55). Upon such notice, the Bank would automatically reissue a new SCD (T.T., p.55).

Gerbers also told Ma that he would earn higher interest on the SCD than he would on a regular passbook savings account (T.T., p.54). Gerbers explained that the SCD was a time deposit and that Ma could not touch the money except in an emergency; but that, in such event, he would not receive the same interest rate as indicated on the SCD.

but the interest rate would be adjusted to a regular passbook savings account. The SCD was automatically renewable up to three years. Relying upon Gerbers' representation, Ma purchased SCD #847 for $4,000 with an International Bank Draft he had brought with him from Australia (T.T., p.56).

For the next year and one-half, Ma continued to do business with The Community Bank, at that time known as Bank of West De Pere, and, in particular, with Gerry Gerbers. Not only did he continue to make deposits and withdrawals from his savings account, but he also purchased additional SCD's and opened a joint account with his brother, Edward Ma (Pl. Exh. #3). The additional SCD's, some of which were approved by Gerbers, all stated that they were NOT NEGOTIABLE and the Bank never informed Ma whether its reissuance procedure had changed from the time he purchased his original SCD's.

In September of 1968, Ma moved from Wisconsin to California to continue his education and notified the Bank by letter of his change of address (T.T., p.76). While in California, he purchased, by mail, three other SCD's #4464, 4465 and 4466, each in the sum of $10,000 (T.T., p.97). He also cashed a number of SCD's by mail and regularly received his interest checks from the Bank.

In September of 1971, Ma moved from California to New York City to pursue his graduate studies. On September 28, 1971, Ma's car was broken into and his two pieces of luggage were stolen (T.T., p.94). One of the pieces of luggage contained the three SCD's #4464, 4465 and 4466 (T.T., p.96). Ma immediately reported the theft, but the police records do not list the SCD's as one of the items stolen (T.T., p.98, Pl. Exh.#5). The next day, Ma called The Community Bank and asked to speak to Gerbers. Ma asked Gerbers if he recognized his voice. Gerbers said "Yes, Jack" (T.T., p.102). Ma told Gerbers of the loss of SCD's #4464, 4465 and 4466. Ma also explained that he had just moved to New York City and did not have a permanent address. Further, he told Gerbers to temporarily withhold his interest checks, coming due on October 9, 1971, until he notified Gerbers of his new

address. Gerbers said he would withhold the interest checks and that Ma should write to the Bank when he found an apartment, to make it formal (T.T., p.103). Gerbers assured Ma that new SCD's, together with the interest checks, would then be mailed to Ma.

On October 20, 1971, Ma sent a letter to the Bank, notifying it of the loss of the three SCD's and requesting that the interest checks and new SCD's be forwarded to him at his new address in New York City (Pl. Exh.#6). He also requested the Bank to notify the police to arrest the thief and contact him immediately, if the thief tried to cash the stolen SCD's. After receiving the letter, Gerbers issued an internal memorandum to all Bank employees respecting the three stolen SCD's and informed the Bank president (T.T., pp.692 & 686). The then Executive Vice President, Mr. James Mulva, then consulted with the Bank's attorney, Mr. William F. Morris, who suggested that Ma be required to furnish an indemnity bond of $50,000 before the Bank could reissue the SCD's and release Ma's interest checks due him (Pl.Exh.#8).

Attorney Morris was concerned about the negotiability of the SCD's and the identity of Jack Ma (Pl.Exh.#27). Ma refused to furnish such excessive bond of indemnity to the Bank (T.T., pp. 141, 60 & 61). The Bank already carried a blanket bond insuring against any loss that might be incurred through honoring a forged withdrawal of a SCD (Insuring Agreement D of Bankers Blanket Bond, Standard Form 24, Fidelity and Deposit Company of Maryland)(Pl.Exh.#25).

By letters dated January 25 and February 26 of 1972, Ma offered to personally come into the Bank and close the account, if this were necessary (Pl.Exh.#10 & 12). The Bank never accepted Ma's offer. On May 10, 1973, the Bank's attorney Morris mailed all the outdated interest checks to Ma at his New Jersey address, claiming that the Bank did not previously have Ma's address and therefore could not forward those interest checks to Ma (Pl.Exh.#13). Between September of 1971 and August of 1973, the Bank had stubbornly refused to be arbitrated by Federal and State Bank supervisory agencies who were

under request from Ma to have the Bank release his funds of $30,000 (T.T., pp.150, 151 & 152). Neither did the Bank turn over the $30,000 to the State or Federal Bank supervisory authorities to put it in an escrow account awaiting the identity of Jack Ma to be resolved. Attorney Morris testified at trial that Ma either had to furnish the Bank a security bond or obtain a judgment of a court directing the Bank to release such funds (T.T., p.562). On August 9, 1973, Ma commenced this action. Deposition of Jack Ma was taken by defendant Bank on January 14, 1976. On January 27, 1976, the defendant Bank moved to deposit $29,025.22 into the U.S. District Court claiming that it had no interest in said funds and that it still could not identify whether the plaintiff, Jack Ma, was its customer, the owner of the $30,000 SCD's. On February 13, 1976, Judge Myron L. Gordon ordered the $29,025.22 paid to the plaintiff.

This case was finally brought on for a court trial on liability on July 9, 1979. On July 25, 1980, the U.S. District Court entered its Memorandum and Order finding (1) the defendant Bank breached its contract with Ma in failing to immediately reissue the three SCD's at issue upon his notification that they were stolen; (2) the Bank fraudulently induced Ma to enter into a contract with it; and (3) the plaintiff is entitled to interest on the interest checks defendant wrongfully withheld, and dismissing Ma's claim against the Bank for the tort of bad faith. (reported at 494 F. Supp. 252) On November 5, 1980, the U.S. District Court held another trial on damages. On November 28, 1980, the District Court entered its Memorandum and Order dismissing all the damages issues Ma claimed against the Bank but awarded Ma $84.29 as interest upon interest checks which were wrongfully withheld from him by the Bank and all statutorily provided for costs (Appendix "B"). On September 16, 1981, Ma appealed to the U.S. Court of Appeals for the Seventh Circuit. On June 8, 1982, the U.S. Court of Appeals for the Seventh Circuit entered a final judgment and opinion (Appendix "A").

REASONS FOR REQUIRING REVIEW

(I) The U.S. Court of Appeals and the U.S. District Court Erred In Reaching The Issue of Entitlement to Damages Before Examining The Question of Liability Based On Fraud, Bad Faith And Conversion Of Defendant-Appellee And The Court Of Appeals Also Erred In Not Remanding The Case To The District Court After It (Court Of Appeals) Found Considerable Evidence Of Bad Faith On The Part Of Defendant-Appellee And In Not Directing The District Court To Consider The Award Of Punitive Damages Based On Bad Faith, Fraud And Conversion.

Plaintiff-appellant submits that it is a basic, fundamental error in logic for the U.S. Seventh Circuit Court of Appeals in its Opinion and Order dated June 8, 1982 (Appendix "A") and the U.S. District Court in its Memorandum and Order dated October 21, 1977 (Appendix "C") to reach the issue of entitlement to damages before examining the question of liability based on fraud, bad faith and conversion by defendant-appellee. Plaintiff-appellant further submits that he can find no federal courts in this country which deal with entitlement to damages prior to deciding the question of culpability. It cannot be justified in reason and/or in law. Such inversion in cause and effect in analyzing this case manisfestly ruins the merits of this case on appeal.

In its Memorandum and Order entered on October 21, 1977, the District Court dismissed Ma's claim for punitive damages for fraud in the inducement to contract, which in the instant case, relates to the Bank's fraud in inducing Ma to purchase SCD's from the Bank (Appendix "C", pp.8 & 9) and again in its Memorandum and Order entered on November 28, 1980 (Appendix "B", p.1). The Court's rejection of Ma's claim for punitive damages for fraud in the inducement was affirmed in the November 5, 1980 damage trial (T.T., p.893). The basis of the District Court's decision appears to be that the defendant Bank's conduct is not malicious towards plaintiff Ma.and therefore ruled that Ma was not entitled to punitive damages as a matter of law. But after the trial, the District Court found the defendant Bank liable for fraud in the inducement to contract

but still found Ma not entitled to punitive damages by adhering to his pre-trial decision. Plaintiff-appellant submits that in Jeffers v. Nysse, 98 Wis. 2d 543 (1980), the Wisconsin Supreme Court held that punitive damages are awardable without a showing of actual malice on a finding of fraudulent misrepresentation in the inducement to enter a contract, at 544, supra.

It is not enough that the Bank has returned to Ma his $30,000. Otherwise, the Bank not only has gotten away with making fraudulent statements to Ma (and likely, other customers as well), but also has by reason of such fraudulent statements, obtained the use of Ma's funds for five extra years (i.e., 1971 to 1976) while it refused to make good on its representation that new SCD's would be immediately issued to a customer upon notice of loss or theft. The Bank will have suffered no punishment nor would it be deterred from similar conduct in the future. The U.S. Seventh Circuit Court of Appeals also held that punitive damages were allowed in an action for fraud or deceit in Seifert v. Solem, 387 F.2d 925 (1967).

The Court of Appeals further erred in analyzing the tort claim of bad-faith breach of contract by basing its disposition on the damages issues in the beginning of its Opinion of June 8, 1982. However, the Court of Appeals did agree that Ma has introduced considerable evidence of the bank's bad faith and unreasonableness in support of his quest for punitive damages (Appendix "A", p.7). (Plaintiff-appellant has submitted about 20 pages of argument, based on fact and on law, in his appellate brief to the U.S. Seventh Circuit Court of Appeals proving defendant-appellee's bad faith conduct in this cause and does not intend to submit here unless this Court orders him to do so.) Accordingly, it should remand the case to the District Court directing it to consider the award of punitive damages based on bad faith (a cause of action added by oral amendment of the complaint at trial), fraud and conversion on the part of defendant-appellee. But it also failed to do so. These two major and obvious errors of the Court of Appeals ominously deprives justice to this appellant and is a violation of his constitutional rights under the Fifth and the Fourteenth Amendments.

(II) The Finding That Plaintiff-Appellant Is Not Entitled To Punitive Damages In An Action In Which He Is Entitled To A Finding Of Fraud, Bad Faith And Conversion Against Defendant-Appellee Is Not The Same As The Granting Of Zero Damages After A Finding Of Entitlement To Damages Resulting In Precluding Review On This Issue Pursuant To Wisconsin Law.

The Court of Appeals is incorrect in its finding that the question of punitive damages is not reviewable. The question of entitlement to punitive damages should be based upon a finding of the requisite conduct. Since the District Court refused to award punitive damages based upon its erroneous findings of lack of requisite conduct and later the erroneous finding of lack of bad faith, the matter should be remanded to the District Court to see what the decision on punitive damages would be if the court had made the findings on bad faith, fraud and conversion that the Court of Appeals agreed on.

Further, after hearing the facts the District Court found that defendant-appellee did act in fraudulently and denied appellant's entitlement to punitive damages. Appellant would not argue if the award was zero damages, i.e., that the damage done was nominal. This may not be reviewable. However, the finding of entitlement, not the amount, is clearly not the same thing and is therefore reviewable.

Plaintiff-appellant would not dispute the reviewability of punitive damages made after a review of the facts and a correct finding. But where as in this case a finding of lack of entitlement to punitive damages was made without reviewing the facts and then again after an erroneous finding of lack of bad faith, appellant strongly urges that the question of punitive damages is reviewable.

(III) The U.S. Court Of Appeals And The U.S. District Court Erred In Denying Plaintiff-Appellant Legal Fees and Litigation Expenses And Other Compensatory And Consequential Damages Where The Defendant Was Found Guilty Of Fraud And Bad Faith And Caused A Case To Become Extraordinarily Lengthy Due To Defendant's Obstinate Refusal To Cooperate With Discovery.

Plaintiff-appellant submits that the U.S. Seventh Circuit Court of Appeals erred in interpreting the grounds which appellant demands attorneys' fees and litigation expenses. Appellant's argument is based upon the "bad faith" doctrine in which a series of Supreme Court and Court of Appeals cases, such as Hall v. Cole, 412 U.S. 1, 15, 93 S. Ct. 1943, 1951, 36 L.Ed 2d 702 (1973); Vaughn v. Atkinson, 369 U.S. 527, 82 S.CT. 997, 8 L.Ed 2d 88 (1962); and Rolax v. Atlantic Coast Line Railroad, 186 F.2d 473 (4th Cir., 1951), did assess attorneys' fees against defendant whose prelitigation conduct left plaintiff no alternative but litigation, despite defendant's duty to deal fairly with plaintiff. Plaintiff-appellant bases his claim for attorneys' fees upon the American Rule's bad faith exception. Plaintiff-appellant contends that bad faith or oppressive conduct which is the basis for the cause of action is ground for an award of attorneys' fees under this exception. Straub v. Vaisman & Co., Inc. 540 F.2d 591 (3rd Cir., 1976).

The most recent Supreme Court case is Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed 2d 488 (1980), in which the Court stated:

> "The bad faith exception for the award of attorneys' fees is not restricted to cases where the action is filed in bad faith. 'Bad faith' may be found, not only in the actions which led to the lawsuit, but also in the conduct of the litigation." (Citation omitted)

Plaintiff-appellant has proved the defendant's outrageous conduct constitutes bad faith which necessitates the expense of this litigation. This bad faith forms a valid basis for the granting of attorneys' fees. Further, upon a finding of bad faith of the defendant bank by the U.S. Seventh Circuit Court of Appeals prior to and in the course of the litigation, assessment of attorneys' fees and litigation expenses against the defendant would be appropriate.

Further, in 6 Moore Federal Practice, paragragh 54.77(2) at 1705, Moore stated that the allowance of attorney's fees is subject to the exception or qualification:

> "the equitable power to make an additional allowance, including counsel fees, although, as we shall see, this power is mainly exercised in cases involving a "fund", but it is, nevertheless, sufficiently extensive to authorize an award of counsel fees in other cases and against a party."

In Hall v. Cole, supra, this Court held that the federal court was permitted to

> "award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (Emphasis supplied)

In Bolax v. Atlantic Coast Line Railroad Co., supra, Judge Parker stated:

> "Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization (in this case, the Community Bank) which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge." (Emphasis supplied)

Further,

> "Where the wrong is of such character that the proper protection of his rights requires plaintiff to employ counsel to gain redress, it has been held that plaintiff may recover reasonable counsel fees as an element of damage." C.J.S. 2d Section 50(a) at p. 781

Defendant Bank's attorney William F. Norris testified at trial that if Ma wanted his funds released from the Bank he should go to the Court having jurisdiction over the Bank to seek a judgment ordering the Bank to release his monies. Clearly, plaintiff-appellant was compelled and oppressed in this litigation with such small means that he could not even find employment to finance this litigation;

and finally, when he had exhausted all his savings, he had to discharge his attorneys and take over this case by himself; and it took him more than a decade and aggravation to fight this case, notwithstanding his never having received any legal training. Therefore, justice requires that attorneys' fees and litigation expenses must be awarded to appellant in this case and the Court of Appeals should remand the case to the District Court for assessment of these costs. Attorney fees are similar to punitive damages in that they are in addition to consequential damages. Since the Court below said that plaintiff was not entitled to punitive damages due to incorrect reasoning, and the same reasoning is applied to the decision to not award attorneys' fees, then this too should be reversed.

Further, in Baker v. Northwestern National Casualty Co., 26 Wis 2d 306 (1965) and in Cedarburg L. & W. Comm. v. Glen Falls Ins. Co., 42 Wis.2d 120, 124-125 (1969), it has been held that attorney's fees are awardable when a plaintiff incurs attorney's fees in a litigation with a third party if the defendant's breach of contract has caused the third party to sue the plaintiff. The theory is premised on the belief that the fees incurred by the plaintiff for defending the third party litigation should be assessed against the defendant because he caused it.

In the case Hazelwood v. Ma, ...#C89-972 in the Milwaukee County Circuit Court, Attorney Hazelwood of the law firm of Quarles & Brady of Milwaukee, Wisconsin sued Ma for legal services rendered because Ma requested Hazelwood and his law firm to assist him in the return of his $30,000 from the defendant Bank. Ma had to retain New York counsel to defend such third party litigation but, finally, was found liable to Hazelwood for legal services rendered. Therefore, attorneys fees and litigation expenses should be assessed against the defendant Bank for its breach of contract with plaintiff.

Finally, plaintiff-appellant wishes to point out that the Court of Appeals erred in finding that appellant failed to introduce

adequate evidence of consequential and compensatory damages and was not prevented from discovering the unjust enrichment of defendant Bank of its wrongful retaining appellant's funds. During the damage trial, plaintiff-appellant did introduce his damages as Plaintiff Damage Exhibit #1. The Court of Appeals apparantly ignored this document and did not review it. Secondly, during the damage trial on November 5, 1980, plaintiff-appellant did subpoena the defendant Bank's president, Wayne Delorne, to testify, inter alia, the unjust enrichment of its wrongful retaining appellant's funds. But District Court Judge Warren granted defendant's motion to quash the subpoena duces tecum submitted in his chamber without giving an opportunity for the plaintiff to answer (T.T., p.872). Accordingly, appellant was prevented from discovering such evidence and from introducing it at trial. This is only one instance showing why this case become extraordinarily lengthy due to defendant's obstinate refusal to cooperate with discovery and the district court's unwarranted prohibition of plaintiff from introducing expert testimony to prove his damages. Therefore, the Court of Appeals erred in concluding that plaintiff-appellant failed to introduce evidence of his damages at trial.

(IV) The U.S. Court Of Appeals And The U.S. District Court Abridged Plaintiff-Appellant's Rights To Choice Of Legal Counsel In the Absence Of A Showing That Plaintiff's Nonresident Counsel Needed To Obtain Assistance Of Local Counsel And Such An Order Was Frivolous And Unwarranted In Light Of The Fact That The District Court Did Not Order Plaintiff-Appellant To Replace Local Counsel After She Withdrew And The Court Of Appeals Erred In Affirming The Lower Court's Application Of Local Rule 2.04 To Plaintiff-Appellant When The Rule Specifically Applies To Nonresident Counsel.

It is respectfully submitted that the U.S. District Court's Order of July 29, 1976 (Appendix "D") is fatally defective because it directs the plaintiff-appellant, rather than his attorney, to obtain Wisconsin local counsel. The first sentence of the Order

recites that defendant made a motion for an order "requiring the plaintiff to obtain local counsel under local rule 2.04." (Emphasis supplied). It is respectfully submitted that under 28 U.S.C. Section 1654, the District Court, while it is given a certain discretion to decide which attorneys may represent parties before it, cannot direct a plaintiff who is a natural person to obtain counsel of any kind. Title 28, U.S.C. Section 1654 provides:

> In all courts of the United States parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Thus, the plaintiff-appellant has a federal statutory right to appear personally and cannot be directed by the court to obtain any attorney at all. This is probably the reason why local rule 2.04 is directed to nonresident attorneys rather than to parties:

> Section 2.04 Local Counsel
> At any time, upon its own motion, the court may require that a nonresident attorney obtain counsel to assist in the conduct of the case. (Emphasis supplied)

The Order is invalid for the further reason that it was not made on the court's own motion as required by local rule 2.04, but upon motion of the defendant.

The very first sentence of the Order appealed from succinctly states both reasons why the Order is invalid on its face: "The defendant has moved for an order requiring the plaintiff to appoint local counsel under local rule 2.04."(Emphasis supplied) The third paragraph of the Order states that: "The defendant's motion is granted ....." The facial invalidity of the Order is obvious. Nowhere is there provision for the defendant making a motion in this matter.

It should be noted that since February, 1975, the plaintiff-appellant's New York attorney, David C. Buxbaum, had been admitted to practice before the U.S. District Court for the Eastern District of Wisconsin, before the U.S. Court of Appeals for the Seventh Circuit as well as the U.S. Supreme Court.

It is respectfully submitted that provision for local counsel

required by local rule 2.04 of the Rules of the U.S. District Court for the Eastern District of Wisconsin is in violation of the U.S. Constitution. It is in violation of the due process clause of the Fifth Amendment as well as the due process and equal protection clauses of the Fourteenth Amendment granted to the plaintiff-appellant by the United States Constitution. If a litigant has an attorney who is admitted to practice before the Court of the Eastern District of Wisconsin, there are no grounds for delimiting the ability of that attorney to appear before the Court. Nothing in the admission of David C. Buxbaum, counsel to Ma in this action, delimited his right to appear or admitted him specially with certain burdens upon his appearance at a later stage of the case. To impose an additional burden on counsel for Ma would be unreasonable and unfair and in violation of Ma's constitutional rights to have counsel of his own choosing.

Even if the Order had been facially valid (directed to plaintiff-appellant's attorney and made on the Court's own motion), it was an abuse of discretion, because no reason justifying the requirement of local counsel in this case has been adduced.

The District Court gave no reason for its decision, except to say in its Order that it had examined the motion papers and believed it was "amply advised in the premises." Therefore, the reason for the District Court's exercise of discretionary authority must be found in those motion papers. A careful review of the record shows that the defendant's motion in requiring Ma to obtain local counsel is merely a strategy of gamesmanship in litigation and a harassment on Ma and creates further financial burden to Ma. The record also shows that local counsel did practically nothing in this case and served no useful purpose to Ma. Such an Order was frivolous and unwarranted in light of the fact that the District Court did not order plaintiff-appellant to replace local counsel after she withdrew from the case.

The Order of the District Court, in addition to being arbitrary and unsupported by any showing of need for local counsel, was an

abuse of discretion for the further reason that it would prejudice the plaintiff-appellant by interfering with his representation of the case. The plaintiff-appellant, after having consulted with seven Wisconsin law firms prior to bringing this action, was finally forced to seek New York counsel to assist him, only because of the apparent disinclination of any of the Wisconsin law firms, and particularly the law firm of Quarles & Brady, to seriously pursue Ma's interest in this case. Ma feels that a nonresident attorney is far more likely to represent him vigorously because such attorney is not subject to the pressures of remaining politically and socially acceptable in the State of Wisconsin. He is not afraid to accuse a local banking institution of wrongdoing, and is not subject to any possible ostracism from local residents that would result from representing an Oriental in an unpopular case, the outcome of which would reflect unfavorably upon a local banking institution.

Thus, the District Court's Order interferes very seriously with the attorney-client relationship, and threatens to gravely undermine Ma's chances of obtaining justice. The District Court with no valid reason, had ordered that an intermediary be placed between the New York attorney and the Court, aside from burdening Ma's financial condition in view of the fact that he is an indigent person.

Plaintiff-appellant respectfully submits that the Court of Appeals erred in logic in concluding the issue of local counsel in this case. When it ultimately agrees with appellant that local counsel did absolutely nothing in this case, it fails to consider why a local counsel is needed in this case in the beginning and it naturally leads to depriving Ma's rights if such local counsel's service is not needed.

For these reasons, it is respectfully urged that the Order of July 29, 1976 appealed from is invalid on its face, and must be reversed and this Court should remand this issue to the District Court and direct it to award appellant local counsel's fees and costs and disbursements and the harassment caused to Ma and such other and further relief this Court may seem just and proper.

(V) Exigent Circumstances Comprising Of Ineffective Counsel By Reason Of A Conflict Of Interest Because Of Conspiracy With Plaintiff-Appellant's Adversary Is Sufficient Grounds For Granting Plaintiff's Request For A Jury Trial Where Said Request Was Not Timely Filed, Especially Where The Defendant-Appellee Would Not Be Unduly Prejudiced.

In its Memorandum and Order dated October 21, 1977 (Appendix "C"), the District Court refused to grant Ma's demand for a jury trial in this case on the grounds that such demand was untimely.

Plaintiff-appellant submits that the untimeliness of his demand for a jury trial in this case was caused by his original attorneys, John A. Hazelwood, David E. Jarvis and their law firm, Quarles & Brady, due to their conflict of interest in simultaneously representing Ma and the parent corporation of The Community Bank, The First National Corporation of Appleton, Wisconsin. Ma's original attorneys wanted to dispose of this case on summary judgment based upon stipulated facts, and never intended to have this case go to trial, so that they could cover up for, and not offend, their larger client, The First National Corp. and its affiliate, The Community Bank, the defendant in this case. Therefore, they never informed Ma of his constitutional rights to a jury trial and did not demand a jury trial when preparing Ma's Complaint.

Plaintiff-appellant submits that the holding of the United States Supreme Court and various federal courts indicate that there must be an intentional, or voluntary waiver, by a plaintiff before Rule 38(d) o the Federal Rules of Civil Procedure should be used to foreclose a plaintiff from having trial by jury. And certainly in this case, because of Quarles & Brady's conflict of interest, Ma made no intentional waiver of his right to trial by jury because he was never informed of his right to have such a trial.

The U.S. Supreme Court has stated that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177 (1937)(Emphasis supplied). Other

Supreme Court cases containing similar statements are Hodges v. Easton, 106 U.S. 408, 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882); Slocum v. New York Life Ins. Co., 228 U.S. 364, 385, 33 S.Ct. 523, 57 L.Ed. 879, Ann. Cas. 1914D, 1029 (1913); Patton v. United States, 281 U.S. 276, 312, 50 S.Ct. 253, 263, 74 L.Ed. 854, 70 A.L.R. 263 (1930); Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603, 95 A.L.R. 1150 (1935); Foust v. Munson S.S. Line, 299 U.S. 77, 84, 57 S.Ct. 90, 81 L.Ed. 49 (1936). This famous statement from the Aetna case has often been cited by courts in granting a jury trial after technical waiver under Rule 38(d). Many cases suggest that an intentional or voluntary waiver requirement should be read into this rule. In Kerschenbaum v. Wool, 13 F.R.D. 333 (D.C.D.C. 1952), the court stated that a late demand for a jury trial would be recognized because it had not been opposed for two years after it was served, and because the court would indulge a presumption against waiver of jury trial (citing Aetna). In Paper Stylists, Inc. v. Fitchburg Paper Co., 9 F.R.D. 4 (N.D.N.Y. 1949), the plaintiff failed to serve a jury demand until it served a note of issue upon the defendant, calling for trial less than one month later. The court cited as among its reasons for ordering a jury trial:

> "the importance of the right to seek trial by jury. Blackstone said that trial by jury is the glory of the law. It is my thought that the right to seek the glory should not be hampered by unreasonable obstacles." (citing Aetna) 9 F.R.D. 4, 5.

See also Container Co. v. Carpenter Container Corp., 9 F.R.D. 261 (D.C. Del. 1949).

It is respectfully urged that the U.S. Supreme Court would, if it ruled on the point, quite likely hold that waiver of the right to a jury trial in a civil case is only effective if it is "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 84 L.Ed. 1461 (1938), following its holdings in the criminal cases, and the great principle announced in Aetna, that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."

Where a party desiring a jury trial has been held to have waived his right to same under Rule 38(d), the question of whether a jury trial will be ordered is left by Rule 39(b) to the discretion of the court.

In Swofford v. B. & W., Inc., 336 F.2d 406 (5th Cir., 1964), cert. den. 85 S.Ct. 653, 379 U.S. 962, 13 L.Ed. 2d 557, the court announced that it was basing its decision upon the principle that the right to a jury trial in a federal court as declared by the Seventh Amendment is a basic and fundamental feature of our system. It may be safely stated that at English common law, Ma in this action, for the return of monies on deposit with the Bank, and for damages for wrongful withholding thereof, would have been entitled to a jury trial as of right.

Ma believes that the judicial system of this country will bring him justice in the form of damages for the deprivation of his assets by the Bank without due process. He has learned, and believes, that trial by jury is the cornerstone of the Anglo-American judicial system in which he has such confidence. For these reasons, it is undeniable that it never entered Ma's mind to waive a jury trial, and that if the option of a trial without a jury had been made to him he would have refused categorically. It is respectfully submitted that the court should recognize a presumption against waiver of any important constitutional right, and that where, as here, it is coupled with the party's undeniable intent throughout the litigation that his case ultimately be resolved by a jury, the waiver provision of Rule 38(d) is not operative.

The judicial discretion permitted in determining whether or not to grant relief from waiver under Rule 39(b) is not synonymous with judicial whim or caprice. 5 Moore's Federal Practice, paragraph 39.09. Where such relief has been granted, the courts have generally found it to be appropriate because of some special circumstances surrounding the failure to make timely demand for a jury trial or have relied on other factors.

In Peterson v. Southern Pacific Co., 31 F. Supp. 29 (S.D.Cal. 1940), the court, in granting a motion for relief from waiver, deemed it a very important circumstance that the moving party's actions showed no intent to waive its right to trial by jury. Ma never intended to waive his right to trial by jury. Beyond that, it is undeniable that Ma affirmatively intended to have a trial, and to have a trial by jury. The denial of a constitutional right to a litigant so firmly intent on availing himself of it would be contrary to the spirit of the Rules and to the traditions of American Jurisprudence, especially where the defendant would not be unduly prejudiced.

In placing the jury trial waiver trap in the Rules, which are in most other respects a decided step away from technicality and gamesmanship in litigation, the drafters and the Supreme Court uncharacteristically created a new technicality. Fortunately, they provided a safety valve in Rule 39(b), of which the Court ought to avail itself in the interest of justice.

Many opinions indicate that the court will be more liberal in granting relief from waiver where the issues are predominently factual, and readily susceptible to trial by jury. Bosley v. Southern Bell Telephone and Telegraph Co., 1 F.R.D. 771 (W.D.La., 1941); Bowles v. Samonas, 7 F.R.D. 104 (W.D.Pa., 1946); Previn v. Barell, 14 F.R.D. 466 (E.D.N.Y., 1953); Washington County Ins. Co. v. Wilkinson, 19 F.R.D. 177 (D. Md., 1956); Marrero v. Continental Cas. Co., 48 F.R.D. 394 (D.P.R., 1969). Factual issues predominate over legal issues in this case, and these factual issues are readily susceptible of decision by jury.

Therefore, plaintiff-appellant's demand for a trial by jury in this case should be granted and the District Court's Decision on May 20, 1976 and again on October 21, 1977 should be reversed.

SUMMARY OF REBUTTAL

The right of the courts to dismiss a cause of action is not challenged by plaintiff-appellant. What is challenged are the reasons

and the logic the Court of Appeals and the District Court approach in analyzing and concluding this case. The reasoning applied in this case is so irrational that it must leave one to conclude that there is an intent to deprive plaintiff-appellant of justice.

CONCLUSION

For all the foregoing reasons, plaintiff-appellant respectfully requests that his appeal be reviewed by this Court and the case be remanded to the U.S. District Court for the Eastern District of Wisconsin for a re-trial before a twelve-man jury to consider the award of punitive damages based on fraud, bad faith and conversion on the part of the defendant-appellee and other compensatory and consequential damages and that this Court award appellant legal fees and litigation expenses, costs and disbursements of this appeal and such other and further relief as this Court may seem just and proper.

Respectfully submitted,

Jack Ma

Jack Ma
Plaintiff-appellant, Pro Se

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

(ARGUED: March 2, 1982)

June 8, 1982

DOCKETED

UNPUBLISHED ORDER
NOT TO BE CITED
SEVENTH CIRCUIT RULE 35

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

JACK MA, a subject of the Republic of China,
Plaintiff-Appellant,

No. 80-2806

vs.

THE COMMUNITY BANK, a Wisconsin banking corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 73-C-427
Robert W. Warren, Judge.

ORDER

At its inception, this diversity case involved a relatively uncomplicated dispute. The plaintiff, Jack Ma, owned three Savings Certificates of Deposit ("SCD's") in the amount of $10,000.00 each, which were stolen from him on September 27, 1971. The defendant bank, issuer of the SCD's, refused to issue new certificates to Ma unless he agreed to execute a Bond of Indemnity, which would cost him $600.00. Ma refused to purchase the bond, primarily because before he had purchased any SCD's from the bank, he had been assured by an officer of the bank that if the certificates were ever lost or stolen, he need only notify the bank and new certificates would be issued to him immediately. Because Ma refused to buy the bond, the bank refused to issue replacement certificates, refused to release the principal, and withheld some (though not all) interest on the principal. The result of this dispute is the present lawsuit, which is now in its ninth year.

APPENDIX "A"

In March 1967, Ma came to the United States1/ to pursue an education, enrolling at St. Norbert's College in DePere, Wisconsin. He opened a passbook savings account at the defendant bank, through Gerald Gerbers, then the head teller at the bank. Ma asked Gerbers about time deposits, and Gerbers informed Ma that the bank offered SCD's, which carried higher interest rates than passbook savings accounts, with penalties for early withdrawal. Ma specifically inquired about the "safety" of an SCD in the event his certificate was lost or stolen. Gerbers assured him that the SCD was safe because it was not negotiable, and that if his certificate were ever lost or stolen he need only notify the bank, and a replacement certificate would be issued to him. Satisfied, Ma purchased an SCD in the amount of $4,000.00.

Ma stayed in De Pere for one and one-half years. During that time he regularly transacted business at the bank, often with Gerbers, making deposits into and withdrawals from his savings account, and purchasing additional SCD's. In September 1968, Ma moved to California, but continued to do business with the bank through the mail. He cashed SCD's when they matured, purchased new ones, and received regular interest checks from the bank. In September 1971, Ma moved to New York, where his SCD certificates were stolen shortly after his move. Each SCD was in the amount of $10,000.00, each was payable to Jack Ma, and each stated it was non-negotiable.

Ma immediately notified the bank by telephone of the theft, and later wrote to the bank, notifying it of his loss and his new address, and requesting that his interest checks and new certificates be sent to him. In response, the bank informed Ma that it would send him replacement certificates and his periodic interest checks only if he purchased an indemnity bond in the amount of $50,000.00. Ma discovered, however, that no bonding company in New York would sell him a bond because he was a foreign student without assets in this country. He so informed the bank, and offered to travel to Wisconsin if necessary to obtain new certificates. The bank made no response to this offer. Instead, in February 1972, the bank notified Ma that it had found a bonding company in Wisconsin willing to sell him the required bond for $600.00, and persisted in its request that Ma purchase the bond. Unwilling to purchase the bond, Ma sought advice from various people, including a law professor at New York University Law School, his former physics professor at St. Norbert's College in

1/ Ma was at that time a citizen of the Republic of China. He has since become a naturalized citizen of the United States.

DePere, attorneys in Milwaukee and Green Bay, an Assistant Regional Director of the FDIC, and numerous public officials. He was consistently advised to take legal action against the bank.2/

During this period, the bank sent Ma periodic interest checks due on the SCD's even though Ma refused to purchase the bond of indemnity. However, the bank withheld eighteen interest checks until May 1973. When he received the checks, he had difficulty depositing some or all of them into his New York bank account because they were so out of date by the time he received them.

Ma filed this lawsuit on August 10, 1973.3/ His amended complaint recited his purchase and the subsequent theft of the SCD's, and alleged seven "causes of action": (1) The bank refused to return the $30,000 to him or to re-issue the certificates, despite his demand. (2) When the bank sent him the withheld interest checks in May 1973, it refused to pay compound rather than simple interest. (3) Ma was humiliated and embarrassed because of the difficulties he experienced in depositing the overdue interest checks. (4) As for the interest checks that were sent to Ma in timely fashion, the bank should have paid compound rather than simple interest rates. (5) The bank knew Ma as one of its customers and had told him that if his certificates were lost or stolen they would be replaced immediately, but later fraudulently denied knowing him and made unreasonable and unlawful demands on him to prevent him from recovering his $30,000. (6) The bank intentionally withheld Ma's money and refused to pay proper interest on it, with the result that Ma was harmed in his living style and suffered loss of business opportunities, and the bank knew or should have known this result would follow from its action. (7) The bank wrongfully converted Ma's $30,000.00 to its own use.

2/ Apparently, one of the lawyers he contacted, who practiced in Green Bay, entered into negotiations with the bank and came up with a solution whereby the bank would keep $750 in interest due to Ma, use that money to pay for the bond, release the principal to Ma, and at some later date return $300, part of the cost of the bond, to Ma. It is not clear why $750 was to be retained though the bond cost only $600. In any event, Ma found this solution unacceptable, and nothing more was done by the Green Bay lawyer.

3/ The case was originally assigned to Judge Myron L. Gordon. In January 1977, Ma moved for Judge Gordon's recusal, contending the judge was biased against him. The case was then assigned to Judge Robert W. Warren.

The bank's defense was, in essence, that its insistence on an indemnity bond was proper because of an identification problem. The bank contended it had no way of knowing that the Jack Ma who had requested new certificates was the same Jack Ma who owned the SCD's. The bank also maintained that because the SCD's were automatically renewable if not cashed upon maturity, the only interest due was that stated in the SCD's: simple interest at 5% per year, payable quarterly.

On January 15 and 16, 1976, Ma was deposed by the bank's attorneys and several bank employees were deposed by Ma's attorney. One of the employees testified she recognized Ma as a customer of the bank. Nonetheless, the bank continued to deny that it could be sure Ma was the owner of the SCD's. The district court, finding the bank employee's recognition of Ma dispositive, entered an order granting summary judgment in Ma's favor on the issue of his entitlement to the $30,000.00. On February 13, 1976, the court ordered the bank to turn over $29,025.22 to Ma.4/

On October 21, 1977 (after numerous disputes, most of which concerned discovery matters and are not pertinent here), the district court entered an order disposing of four of Ma's causes of action. With respect to the first cause of action, although Ma's demand for return of the $30,000.00 was moot in light of the summary judgment granted on February 13, 1976, the court held that a claim was stated, in that if the bank had agreed not to require a bond of indemnity when Ma bought the SCD's, its later insistence on the bond would amount to a breach of contract. The breach of contract claim was reserved for trial. The court read the second cause of action as a claim for interest on the withheld interest checks and concluded that if the checks were wrongfully withheld, the bank should pay interest on them. Accordingly, this claim was also reserved for trial. The court granted summary judgment for the bank on Ma's third cause of action, his claim of humiliation when he tried to deposit the untimely-paid interest checks.5/

4/ The district court ordered that $974.78 be withheld from the $30,000.00 to pay Ma's original attorney in the lawsuit who had obtained a judgment against Ma for attorneys' fees and had brought garnishment proceedings against the bank to satisfy the judgment.

5/ Although the district court purported to dismiss this claim, we construe the dismissal as a grant of summary judgment because the court relied on deposition testimony. Fed. R. Civ. P. 12(c).

The court held, first, that the bank did not cause any humiliation Ma may have suffered because Ma could see the dates that appeared on them.6/ Moreover, the court found that Ma was in fact permitted to deposit the checks into his New York account, upon condition that he allow time for them to clear before making withdrawals. The court found this arrangement insufficiently humiliating to support a claim for damages. The district court also granted summary judgment to the bank on Ma's fourth cause of action, his claim that he should have been paid compound interest on the wrongfully withheld $30,000.00. The court held that because the SCD's provided for automatic renewal at the same interest rate, no compound interest was due. The court found that the fifth cause of action stated a claim that the bank fraudulently induced Ma to purchase the SCD's by assuring him that if they were lost or stolen they would be reissued immediately, without telling him a bond would be required. This claim was accordingly reserved for trial. The court regarded Ma's sixth and seventh causes of action as a single charge of conversion, and dismissed them because the claim of conversion was no different from the breach of contract claim. Finally, the court addressed Ma's demand for punitive damages and for damages for lost business opportunities, holding neither type of damages recoverable. Punitive damages are not recoverable for mere breach of contract, the court held. Moreover, while agreeing that a breach of contract may amount to a tort, and that punitive damages might be recoverable for some torts, the court found that "[t]he facts of this case do not show the requisite conduct necessary to sustain the award of punitive damages." Regarding Ma's claim of lost business opportunities, the court denied such damages because they were speculative, because they were not within the contemplation of the parties, and because Ma did not exercise ordinary diligence in minimizing his losses.

Two other pretrial matters are pertinent to this appeal. The first is Ma's request for trial by jury, filed on January 28, 1976. The district court refused to allow a jury trial because the demand was not timely. Ma filed subsequent motions requesting jury trial, and they were similarly denied. Secondly, on July 14, 1976, the bank moved for an order requiring Ma to retain local counsel, relying on the district

6/ We take it from the lower court's memorandum that it felt Ma knew or should have known he would have trouble negotiating the checks because of their date and that he brought the embarrassment upon himself in attempting to negotiate them despite their date.

court's Local Rule 2.04. The bank argued that local counsel was necessary because of communication difficulties with Ma's New York attorney. Ma opposed this motion, arguing that communication problems had been minimal and would not be alleviated by his retention of local counsel because he intended his New York attorney to continue to have full responsibility for the case. Ma urged that the bank's motion to force him to hire--and pay--local counsel amounted to harassment and was an attempt to force Ma to drop the suit by making it too costly for him to continue. On July 29, 1976, the district court, stating that it had read the parties' arguments and was "amply advised in the premises," ordered Ma to obtain local counsel. Ma's interlocutory appeal to this court was dismissed in Ma v. Community Bank, No. 76-1856 (November 8, 1976) (unpublished order). Ma's local counsel filed an appearance on September 22, 1976.

Trial on Ma's three remaining claims (breach of contract, interest on interest, and fraudulent inducement) began on July 9, 1979 and was concluded on July 13, 1979. At the conclusion of the trial it was agreed that the parties would attempt to stipulate to the amount of damages due in the event the bank was found liable to Ma. In February 1980, Ma's New York and local counsel withdrew from the case and Ma was permitted to proceed pro se. On July 25, 1980, the district court filed its memorandum and order holding the bank liable to Ma on all three of his claims. Because the parties had not agreed on damages, the court ordered that a damages hearing would be necessary. This hearing was held November 5, 1980. On November 23, 1980, the district court awarded damages of $84.29 to Ma. This amount represented interest at 5% per year on the withheld interest checks. The court held that Ma was not entitled to any other damages.1/

Ma appealed to this court. In his appeal, he raises eight issues for review. His primary concern is the damages to which he is entitled. We address the damages issues first.

I. Damages

The damages Ma sought were: (1) return of his $30,000.00; (2) interest on the wrongfully withheld $30,000.00 and on the eighteen interest checks that were wrongfully withheld between October 1971 and May 1973; (3) attorneys' fees and litigation costs; (4) punitive damages; and (5) "consequential" damages for emotional distress, loss of business opportunities, injury to reputation, injury to professional career, and loss of living comfort and ease.

Ma was awarded the return of his $30,000.00. The bank had paid interest to him, during the years it withheld the

1/ The court did, however, award costs to Ma, as provided by statute.

principal, at the rate of 5% per year, not compounded, and the court refused to award interest on the principal over and above that amount. The court did award 5% per year simple interest, however, on the eighteen interest payments the bank had withheld. Ma introduced in evidence the attorneys' fees and litigation costs he had incurred, but he was not awarded these damages. He introduced considerable evidence of the bank's bad faith and unreasonableness in support of his quest for punitive damages, but he was not awarded such damages either.8/ Finally, he was not permitted to introduce evidence of his consequential damages and was not awarded such damages.

Ma objects to the damages award he received, contending, first, that he should have received more than 5% simple annual interest both on the withheld principal and on the withheld interest checks.9/ He also contends that he should have been awarded attorneys' fees, litigation expenses, and punitive damages. Finally, he contends he should have been permitted to demonstrate consequential harm (emotional distress, injury to reputation, etc.) and should have been awarded damages for such harm.

A. Interest

(1) Prejudgment Interest. The district court held that Ma was entitled to prejudgment interest on the money the bank withheld from him. Under Wisconsin law, prejudgment interest is due on a breach of contract claim where the amount claimed by the plaintiff is a sum certain. E.g., Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 438 (1978). Prejudgment interest is calculated at the "legal" rate unless there is a specific contractual rate, in which case the contract rate applies. Id. at 438-39. In this case, the interest rate specified by the contract happens to be the same as the legal rate: 5% per year, not compounded. Wis. Stat. Ann. § 138.04 (1973). As noted above, the lower court found that the bank owed no interest to Ma on the $30,000.00 principal because

8/ As a sanction for failure to cooperate in discovery, the court prohibited Ma from introducing expert testimony on the reasonableness, as measured by banking industry practice, of the bank's actions. See Fed. R. Civ. P. 37(b)(2)(B). Ma does not argue that this sanction was unwarranted. Other evidence of bad faith was admitted.

9/ The bank asserts that with regard to interest Ma seeks only a higher rate on the withheld interest checks. A fair reading of his brief, however, shows that he seeks a higher rate on both the principal and the interest. See Brief of Appellant at 18-20. Cf. Haines v. Kerner, 404 U.S. 519 (1972) (courts should construe pro se litigants' pleadings liberally).

during the time the bank withheld the principal, it paid Ma 5% simple interest on the principal. However, because some of the interest payments were unjustifiably delayed, the court held that the bank owed Ma interest at the contract rate of 5% not compounded on the delayed interest payments.

If Ma simply claimed entitlement to prejudgment interest, we would agree with the lower court's conclusion. However, Ma claims entitlement to a higher rate of interest, on the basis of two other theories. First, he claims interest as a measure of the bank's unjust enrichment. Second, he claims interest as a measure of the consequential damages he suffered. We turn now to these arguments.

(2) Interest as a Measure of Consequential Damages

In Wisconsin, "[a]n award of damages for breach of contract should compensate the injured party for losses necessarily flowing from the breach." Repinski v. Clintonville Federal Savings & Loan Assoc., 49 Wis. 2d 53, 58, 181 N.W. 2d 351 (1970); accord, e.g., Sporleder v. Gonis, 68 Wis. 2d 554, 559, 229, N.W. 2d 602 (1978). The amount of such losses, however, must be proved with reasonable certainty. Although mathematical precision is not required, the plaintiff must introduce evidence in the record that is "sufficient to enable a court or jury to make a fair and reasonable approximation" of the losses sustained as a result of the defendant's breach. Metropolitan Sewerage Commission v. R. W. Construction, Inc., 78 Wis. 2d 451, 469, 255 N.W. 2d 293 (1977). Thus, for example, in Plywood Oshkosh v. Van's Realty & Construction, 80 Wis. 2d 26, 257 N.W. 2d 847 (1977), the court denied recovery of approximated losses because available evidence, which would have shown the amount of loss with greater precision, was not introduced.10/ Applying these principles to the present case, Ma was entitled to recover a rate of interest higher than 5% per year not compounded if: (1) he demonstrated that he was prevented from realizing such higher rate as the result of the bank's breach of contract, and (2) he demonstrated, with reasonable certainty, the amount of interest he was prevented from realizing. We hold that Ma succeeded in making both demonstrations, and that the district court erred in failing to award him a higher rate of interest.

10/ Compare Cutler Cranberry Co. v. Oakdale Electric Cooperative, 78 Wis. 2d 222, 254 N.W. 2d 234 (1977) (recovery of approximated losses permitted where loss resulted from damage to growing crops; evidence of crop yields from prior years was a sufficient basis from which to estimate the loss, and more precise proof of loss was impossible).

At trial, Ma introduced evidence, which the bank has not attempted to contradict, that on July 1, 1973, the bank began paying interest on SCD's at a rate of 5.5% per year, compounded daily. To take advantage of this higher rate, customers of the bank who held 5% SCD's were required to exchange their old certificates for new ones reflecting the higher rate. Ma was unable to exchange his certificates because they had been stolen, and the bank refused to issue replacements. It is established that the bank's refusal to issue replacement certificates was in breach of contract. It cannot be disputed that a direct result of the breach was that Ma was unable to realize the higher interest rate paid by the bank on SCD's after July 1, 1973. And the amount of interest thus lost was established with certainty by uncontradicted evidence.

The defendant appears to suggest that Ma is entitled to no consequential damages because he failed to minimize them. We disagree. It is true that "a plaintiff must do all that is reasonable to minimize damages," Sprecher v. Weston's Bar, Inc., 78 Wis. 2d 26, 253 N.W. 2d 493, 500 (1977). But the bank's apparent belief that Ma should have minimized his damages by acquiescing in the bank's demand that he purchase the indemnity bond is erroneous. A similar argument was rejected by the Wisconsin Supreme Court in O'Brien v. Isaacs, 17 Wis. 2d 261, 116 N.W. 2d 246 (1962). In O'Brien, plaintiff was forced to leave his car in defendant's parking lot overnight, through the fault of the defendant. The following day, defendant refused to release plaintiff's car unless plaintiff paid him $1.00 for overnight parking. Plaintiff refused, and instead recovered the car by means of a replevin action. He then sued the defendant for $41.00, the cost he incurred in renting a car for three days until his own car was replevied. The Wisconsin Supreme Court rejected defendant's argument that plaintiff should have avoided this expense by paying defendant the $1.00 parking fee. The Court stated:

> Defendant does not contend that $41 is an unreasonable amount for plaintiff's time loss, and for the value of the use of the car over the weekend. Defendant's contention, in essence, is that plaintiff should have paid him a dollar to prevent him from committing a tort. Although the great mass of mankind may have chosen to pursue this course in retrieving the automobile, we cannot say that the law so requires. To so hold would be to require submission to demands which in some instances might be extortionary.

Id. at 267. In the present case, Ma took numerous steps to retrieve his funds from the bank, including offering to travel from New York to DePere to prove his identity. The bank chose to ignore this offer, and steadfastly insisted, even after a

bank employee identified Ma, that it could not release his money because it could not identify him. In light of O'Brien, we cannot say that, in addition to Ma's other efforts to recover his money, he was required to submit to the bank's unfounded demand that he purchase an indemnity bond for the bank's protection before he could recover his funds.

Accordingly, we conclude that Ma is entitled to recover interest on $30,000.00 at the rate of 5.5% per year, compounded daily, for the period beginning July 1, 1973 and continuing until the date the bank returned Ma's money to him.11/ Naturally, this amount should be offset by the amount the bank paid to Ma as interest on the principal after July 1, 1973.

(3) Interest as a Measure of Unjust Enrichment. In Kilgust Heating v. Kemp, 70 Wis. 2d 544, 235 N.W. 2d 292 (1975), the Wisconsin Supreme Court recognized that interest may be awarded as a measure of the wrongful benefit realized by the defendant. But the court made clear that the amount of such wrongful benefit must be proved. Id. at 550. Ma contends that he is entitled to recover whatever profit the bank realized while it withheld his money.

We do not doubt that the bank realized a comfortable profit during the years it wrongfully retained Ma's money while paying him 5% simple interest. But Ma introduced no evidence to establish the amount of the bank's profit. The record does not reveal, and Ma does not suggest, that he was prevented from discovering such evidence or from introducing it at trial. We conclude that because Ma failed to prove the amount of the bank's "wrongful benefit," the trial court's failure to award interest on the basis of such benefit was not error.

B. Punitive Damages

Ma correctly argues that in appropriate cases punitive damages may be awarded for fraudulent inducement to contract. See, e.g., Jeffers v. Nysse, 98 Wis. 2d 543 (1980), in which the Wisconsin Supreme Court held that "punitive damages may be awarded where a fraudulent representation is made and relied on to induce a contract in willful, wanton, or reckless disregard of the plaintiff's rights." Id. at 553. This proposition is

11/ However, the trial court's award of interest on the delayed interest payments at the contract rate of 5% per year, not compounded must remain standing. Ma may not receive the higher rate of interest on the withheld interest checks because the bank remitted the checks to him in May, 1973, before the higher rate took effect.

APPENDIX "A"

not disputed by the bank. Rather, the bank points out, correctly, that under Wisconsin law, the factfinder's refusal to award punitive damages is not reviewable by an appellate court, even though such damages might be permissible. In Wangen v. Ford Motor Co., 97 Wis. 2d 260, (1980), for example, the Wisconsin Supreme Court stated: "Even if the jury is satisfied to a reasonable certainty by evidence that is clear, satisfactory and convincing that the defendant's conduct was 'outrageous,' in Wisconsin, the jury need not award punitive damages. . . . The jury's refusal to award punitive damages is not reviewable." Id. at 301-02 (citations omitted).

Ma's response appears to be that the district court's ruling on punitive damages is reviewable because the court did not make the ruling after trial, in its capacity as factfinder, but rather ruled, in its October 21, 1977 partial summary judgment order, that Ma was not entitled to punitive damages as a matter of law.

As described above, the district court stated in its October 21, 1977 order that "[t]he facts of this case do not show the requisite conduct necessary to sustain the award of punitive damages." We agree that the district court erred in making this premature finding of fact. The court's error, however, was not reversible. At trial, Judge Warren repeatedly allowed Ma's attorney to introduce evidence of the bank's unreasonableness and arbitrariness for the express purpose of showing that punitive damages should be awarded. After reviewing such evidence, the judge adhered to his previous conclusion that he would not award punitive damages. In practical effect, the judge's final ruling on punitive damages was made in his capacity as factfinder. The ruling is therefore not reviewable.

C. Attorneys' Fees and Litigation Costs

Further, we hold that the district court did not abuse its discretion in refusing to award attorneys' fees and litigation costs. This court has held that "[e]xcept when overriding considerations of justice compel them, it is the policy of federal and state courts to deny attorneys' fees in the absence of statutory authorization or agreement." Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621, 628 (7th Cir. 1971). Ma contends that this is a proper case for an award of attorneys' fees and litigation costs because the bank's conduct was particularly unreasonable. He relies on Vaughan v. Atkinson, 369 U.S. 527 (1962), a seaman's suit for maintenance and cure, in which the United States Supreme Court held that attorneys' fees should have been awarded as a matter of equity. The Court stated:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

Id. at 530-31. Certainly, if Vaughn controlled this case, it would support Ma's argument that attorneys' fees and litigation expenses are recoverable here. But this case is governed not by federal admiralty law but by the law of Wisconsin, which appears to take a much stricter view of the allowability of attorneys' fees. In Baker v. Northwestern National Casualty Co., 26 Wis. 2d, 306 (1965), the Wisconsin Supreme Court reversed a jury's award of attorneys' fees even though the Court upheld the jury's determination "that the massive failure of [the defendant insurance company] to carry out its duties . . . evidenced such a shocking disregard of its insured's interests as to constitute 'a suggestion of dishonesty' or 'a species of fraud,' within the meaning of 'bad faith.'" Id. at 315. In light of Baker, even if we were to agree with Ma that the bank's conduct was utterly lacking in good faith and reasonableness, we are constrained to conclude that he may not recover attorneys' fees or litigation costs in excess of the amount permitted by statute.

D. Consequential Damages

We have discussed Ma's entitlement to interest as a measure of consequential damages. Ma seeks, in addition, damages for injury to his professional career, injury to his reputation, loss of living comfort and ease, and emotional distress.

We agree with the district court that these damages are too speculative to permit Ma's recovery. First, Ma's claim of damage to his professional career is unavailing in light of Baker v. Northwestern National Casualty Co., supra, in which the Wisconsin Supreme Court held that lost profits of a company to be formed in the future were too speculative. Here Ma had not yet embarked upon a professional career at the time of the bank's breach, and therefore he has no prior earnings that can be compared to his earnings subsequent to the breach. He is entitled to no recovery for this alleged loss. Accord, M. Schultz Co. v. Gether, 183 Wis. 491, 198 N.W. 433 (1924).

Second, Ma's generalized claim that he suffered severe emotional distress is insufficient to form a basis for recovery of such damages. In Wisconsin, to recover for emotional distress damages resulting from a fraud, the plaintiff must plead and prove (1) that the defendant acted for the purpose of causing the plaintiff emotional distress; (2) that the defendant's conduct was extreme and outrageous; (3) that the defendant's conduct was the cause-in-fact of the injury; and (4) that the plaintiff suffered an extreme disabling emotional response to the defendant's conduct. D.R.W. Corporation v. Cordes, 65 Wis. 2d 303, 309, 222 N.W. 2d 671 (1974). Alternatively, to recover emotional distress damages resulting from a bad-faith breach of contract, the plaintiff must plead and prove "substantial damages apart from the emotional distress itself and the damages occasioned by the simple breach of contract." Anderson v. Continental Insurance Co., supra, 85 Wis. 2d at 696. Ma failed to meet either standard of pleading and proving emotional distress damages. Finally, with regard to his claims of injury to his reputation and of loss of living comfort and ease, Ma has never made specific factual allegations or offered specific factual evidence in support of such claims. In the absence of such evidence, it is impossible to arrive at a "fair and reasonable approximation" of the losses for which Ma now seeks recovery. See R.W. Construction, supra, 78 Wis. 2d at 469.

Ma concedes that speculative damages are not recoverable, but argues that because the district court ruled in its summary judgment order that he was not entitled to these damages, he was improperly denied the opportunity to offer specific evidence of his losses. We cannot agree. Throughout the four-day liability trial, and at the damages hearing, the court demonstrated considerable flexibility in admitting evidence that was arguably precluded under its earlier rulings. We are satisfied that had Ma sought to introduce specific evidence of his losses, the court would have permitted it. But Ma made no such offer of proof and does not, even now, assert facts to support his claim of these losses. In light of Ma's failure to introduce adequate evidence of consequential damages (other than interest), we conclude that the district court's refusal to award such damages was not error.

II. Dismissal of Tort Claims

Ma contends that the district court erred in dismissing his tort claim of bad-faith breach of contract and in dismissing his tort claim of conversion. These issues are moot in light of our disposition of Ma's damage arguments. Even if he had proved both of these claims, his interest recovery would not thereby be affected. Such recovery is limited because Ma's proof of actual loss was limited, not because he was prevented from demonstrating the bank's tort liability. Nor would Ma be entitled to attorney's fees, litigation costs, or punitive

damages. Such remedies depend on the nature of the wrongdoer's conduct, not on the classification of the underlying wrong as breach of contract or tort, see Wangen v. Ford Motor Co., 97 Wis. 2d 260, 267 (1980). The nature of the bank's conduct was fully aired at trial and, as discussed above, the district court did not abuse its discretion in denying attorneys fees, and we may not review the denial of punitive damages. Finally, had Ma proved his claims of bad faith and conversion, his consequential damages would still have been limited because of his failure to prove their amount.

We conclude that no reversible error resulted from the district court's dismissal of Ma's claims of bad faith and conversion.

III. Jury Demand

Ma's jury demand was untimely under Federal Rule of Civil Procedure 38(b), which provides:

> (b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

The "last pleading" was the bank's amended answer, filed May 21, 1975. Ma's jury demand was not filed until January 28, 1976. Under Rule 39(b), the district court had discretion to order trial by jury despite the untimely demand, upon Ma's motion requesting it. He filed such a motion on March 29, 1976. The decision to grant or deny the motion was committed to the sound discretion of the district court and will be overturned only for abuse of discretion. See 5 Moore's Federal Practice ¶ 39.09, at 39-19 (2d ed. 1981). As a general rule, mere inadvertence will not justify relief from a waiver of the right to trial by jury; some other reason for relief must be shown. Id. at 39-30. Ma asserts that his delay in demanding jury trial was caused by his original attorneys and their law firm, "due to their conflict of interest in simultaneously representing Ma and the parent corporation of the Community Bank . . . ." Brief of Appellant at 23. But assuming such a conflict existed, it does not explain why Ma's New York counsel, who filed an amended complaint in April 1975 and could have demanded a jury trial at any time within 10 days after May 21, 1975, failed to do so. The record does not support a finding that the district court abused its discretion in denying Ma's motion for a jury trial.

APPENDIX "A"

IV. Local Counsel

Ma argues that the district court erred in applying Rule 2.04 of the Rules of the District Court of the Eastern District of Wisconsin and requiring him to obtain local counsel.12/ Rule 2.04 provides:

> At any time, upon its own motion, the Court may require that a non-resident attorney obtain local counsel to assist in the conduct of the case.

Ma challenges the trial court's order on two grounds: (1) that he has a federal statutory right to appear personally and cannot be compelled to retain any attorney at all, even local counsel; and (2) that the imposition of the rule was unnecessary and unduly burdensome.

Ma's first contention raises the question of whether the district court exceeded its rulemaking authority when it promulgated rule 2.04, in light of the statutory guarantee of 28 U.S.C. § 1654 that "in all courts of the United States parties may plead and conduct their own cases personally or by counsel . . . ." We conclude that Rule 2.04 does not unduly infringe the rights of individual litigants to proceed pro se or to select counsel of their own choosing.

12/ Ma sought our review of this question in 1976 by means of an interlocutory appeal. At that time we declined to extend the Cohen collateral order rule to permit our review of the trial court's order. Ma v. Community Bank, No. 76-1856 (November 8, 1976) (unpublished order). The issues raised in the interlocutory appeal have now merged into the final judgment and are appropriately raised for review.

The Federal Rules of Civil Procedure,13/ in accordance with the Judicial Code,14/ clearly empower district courts to promulgate housekeeping rules. See Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring); Miner v. Atlass, 363 U.S. 641 (1960), modified in Colgrove v. Battin, 413 U.S. 149, 163-64 (1973) (federal rules shall not modify "substantive rights" or establish "basic procedural innovations"); Sibbach v. Wilson & Co., 312 U.S. 1(1941). Cf. Rodgers v. United States Steel, 508 F.2d 152, 163-64 (3d Cir.), cert. denied, 423 U.S. 932 (1975) (local rule restricting communication among putative class members held invalid); Coles v. Marsh, 560 F.2d 186, 189 (3d Cir. 1977) (district court's order restricting communication among putative class members held invalid). The legislative history of section 2071 of the Judicial Code illustrates that "broad rule-making power was intended." H.R. Rep. No. 308, 80th Cong., 1st Sess., at A169 (1947), quoted in 7 Moore's Federal Practice ¶ 38.02, at 88-3 (2d ed. 1979); cf. Galveston Dry Dock & Construction Co. v. Standard Dredging Co., 40 F.2d 442, 444 (2d Cir. 1930) (L.Hand, J.)(local rule in admiralty). Rule 2.04 is designed to facilitate the filing and service of papers with the court and to provide the court with greater flexibility in scheduling status hearings. These goals are clearly permissible regulation of the "procedure" by which claims are litigated. Nothing in Rule 2.04 requires that the services of local counsel extend beyond this essentially mechanical function. The litigant remains free to control his own case and to be represented by counsel of his own choosing. Thus, Rule 2.04 does not have any substantial adverse impact on rights conferred on litigants by section 1654 of the Judicial Code.

13/ Rule 83 of the Federal Rules of Civil Procedure provides in part:

> Each district court by action of a majority of judges may from time to time make and amend rules governing its practice not inconsistent with these rules. * * * In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

14/ 28 U.S.C. § 2071 provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

Ma's second argument attacks the wisdom of Judge Gordon's imposition of Rule 2.04 in this case.15/ First, Ma argues that imposition of the rule was unnecessary because there were only two incidents in which he failed timely to serve documents that he had filed with the court. One of those documents, however, was a petition for writ of mandamus, a requested form of relief that urges expedited action by the district court. Failure of timely service of such a paper, even if caused by "secretarial error," as Ma alleges, is serious. Second, Ma points out that at the time the district court ordered him to obtain local counsel, he was already represented by a New York attorney who was admitted to practice before the bar of the Eastern District of Wisconsin, though not the Wisconsin state bar, and who was quite able to continue adequately that representation. He argues that imposition of Rule 2.04 was oppressive because its necessary intent and effect was to compel him to turn over the control of his case to local counsel, to finance the education of new counsel on the nature of the case, and to incur costs and fees inevitably generated by local counsel.

Ma's objections to the requirement of local counsel are based on a fundamental misapprehension of the purpose of Rule 2.04. As noted above, Rule 2.04 is designed to facilitate mechanical service and not to deprive a plaintiff of the right to select any attorney, from whatever location he desires, to represent his case.16/ In fact, Ma acknowledges that "local counsel filed no motion papers, except her motion to withdraw, no briefs nor other legal documents . . . . [S]he did absolutely nothing in this case." Reply brief at 7. In light of these concessions, it is difficult to see how the appointment of local counsel deprived Ma of the right to control the course of his litigation. It is equally difficult to see, in light of local counsel's inactivity, how her appointment could have generated unduly burdensome fees.

15/ Ma also raises two arguments related to whether the terms of Rule 2.04 were satisfied. He argues, first, that Rule 2.04 empowers district courts to order nonresident attorneys, but not their clients, to obtain local counsel. Second, he contends that Rule 2.04 contemplates district courts acting only on their own motion and not upon the suggestion of another party. These arguments have no merit. Whether the district court's order to obtain local counsel is addressed directly to the litigant or to the litigant through his nonresident attorney is immaterial; and a district court cannot be deprived of the power to correct abuses in service of process when a party has alerted the court to the need for corrective action.

16/ Ma correctly recites that Wisconsin courts liberally permit pro haec vice appearances by out-of-state counsel. Brief of Appellant at 28-29. This proposition, however, is inapposite to a district court's considered judgment that Rule 2.04 ought to be applied.

We conclude that Judge Gordon did not abuse his discretion in concluding that local counsel would assist in the prosecution of the case without causing undue burdens to Ma.

V. Bias of the District Judge

Ma's claim of bias on the part of Judge Warren is unsupported in the record. Adverse rulings do not show bias requiring disqualification of a trial judge. E.g., United States v. English, 501 F.2d 1254, 1263 (7th Cir. 1974). "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966), quoted in English, supra, at 1263. Ma complains that Judge Warren lived in De Pere "for a while," and knew that bank attorney Morris had practiced law for a considerable time. It cannot reasonably be concluded from these bare facts that Judge Warren's disposition of the case was based on something other than what he learned during the course of the litigation.

Conclusion

For the reasons stated above, the judgment of the district court denying Ma a recovery of interest in excess of the statutory prejudgment interest rate is reversed. Ma is entitled to recover interest on $30,000.00 at a rate of 5.5% compounded daily, for the period from July 1, 1973 to the date the bank relinquished his funds, less the interest already paid by the bank on such principal during that period. The case is remanded for the purpose of recalculating Ma's interest award. In all other respects, the district court's judgment is affirmed.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JACK MA,

Plaintiff,

vs. Case No. 73-C-427

THE COMMUNITY BANK,

Defendant.

MEMORANDUM AND ORDER

On November 5, 1980, the Court held the damage portion of this trial. Previously, in an order dated July 25, 1980, the Court found the defendant The Community Bank had breached its contract with the plaintiff Jack Ma and had fraudulently induced the plaintiff to purchase a number of savings certificates of deposit. The Court also held that the defendant was not liable for it failure to negotiate a settlement with the plaintiff. In addition, as it had earlier stated in a previous summary judgment motion, the Court ruled that on the facts of the case, the punitive damages were not awardable.

At the damage trial, the plaintiff, proceeding pro se, first attempted to persuade the Court to reconsider its decision regarding punitive damages. To that end, he called Mr. William Morris, the bank's local attorney, as his first witness. After some initial questioning of Mr. Morris, and argument by the parties, the Court informed the plaintiff that it would not reconsider its decision and that any questioning along those lines would not be permitted. The witness was then excused and defense counsel moved for payment of costs to the witness alleging that the subpoena was vexatious. The Court took this motion under advisement.

APPENDIX "B"

Plaintiff then testified on his own behalf and offered as Exhibit 1 in the damage trial a list of itemized damages that he believed represented his compensatory damages. The exhibit is a detailed statement of all telephone calls, travel expenses, attorneys' fees, and other litigation costs which the plaintiff has incurred since he instituted this action in 1973. The Court received the exhibit over defendant's objection, but with the understanding that the Court would determine its relevancy later. The plaintiff did not offer any other evidence, but the defendant did submit a computation of interest owed on the interest checks withheld, which amounted to $84.29. The issue the Court must now resolve is what portion of plaintiff's listed expenses are recoverable as damages.

The items of alleged damages listed by plaintiff can be classified into two groups: attorneys' fees and other litigation expenses. The general rule in Wisconsin is that attorney's fees are not awardable as damages in an action absent any statutory or contractual provisions for them. Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621 (7th Cir. 1971); Murray v. Holiday Rambler, Inc., 83 Wis.2d 406 (1978); Cedarburg L. & W. Com. v. Glen Falls Insurance Co., 42 Wis.2d 120, 124-25 (1969); Baker v. Northwestern National Casualty Co., 26 Wis.2d 306 (1966).

One recognized exception to this rule arises when a plaintiff incurrs attorney's fees in a litigation with a third party if the defendant's breach of contract has caused the third party to sue the plaintiff. The theory is premised on the belief that the fees incurred by the plaintiff for defending the third party litigation should be assessed against the defendant because he caused it. Cedarburg L. & W. Com. v. Glen Falls Insurance Co., 42 Wis.2d at 125.

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Some of the plaintiff's claims for attorneys' fees were incurred in a malpractice suit against the plaintiff's former counsel in this action. This litigation, however, did not arise as a result of defendant's breach of contract. Consequently, the exception to the general rule on disallowance of attorney's fees is not applicable. There being no other basis, statutory or otherwise, for an award of attorneys' fees, the Court finds the plaintiff is not entitled to any award of fees.

Similarly, reviewing the other litigation expenses incurred by the plaintiff, the Court finds that there is no basis for an assessment of those expenses against the defendant. As with attorney's fees, the general rule is that litigation expenses (travel, hotel, telephone and photocopy expenses) are not awardable as damages in an action between a plaintiff and a defendant. 42 Wis.2d at 124-25. Plaintiff has advanced no reason why the general rule should not apply and the Court finds none. Therefore, the Court must conclude that the plaintiff is not entitled to any of the expenses listed in his damage exhibit and the exhibit is consequently irrelevant.

Despite the Court's finding that plaintiff is not entitled to attorneys' fees or other litigation expenses, the Court does find that he is entitled to the interest on the interest checks which were wrongfully withheld from him by the bank.

As mentioned in the Court's previous decision, the defendant had withheld the plaintiff's interest checks and the three certificate of deposits (CD), each in the amount of $10,000, because a question as to the plaintiff's identification arose after the plaintiff reported the loss of the CD's to the bank. Almost three years after the initiation of this litigation, and pursuant to a court order, the

APPENDIX "B"

defendant turned over the principal amounts of the CD's. The interest checks were also delivered to the plaintiff at various times. There is no dispute as to the sum of money plaintiff is entitled to regarding the interest on the withheld interest checks. Therefore, the Court finds that the plaintiff is entitled to the sum of $84.29 from the defendant as interest on the overdue interest checks.

Finally, the Court finds that, with respect to the calling of Mr. Morris as a witness in this portion of the case, the plaintiff's actions were indeed vexatious. The Court, however, must view this action in perspective with the whole case. Mr. Morris was the attorney who originally advised the bank not to replace the stolen CD's because of his concerns of negotiability and identity. At the liability portion of the trial his testimony was very important. The Court must also consider the plaintiff's status as a pro se litigant who has expended an enormous amount of unrecoverable time, effort, and money pursuing his case. Considering all these factors, the Court will decline to award the defendant or the witness any costs for his appearance at trial.

In summary, the Court finds that plaintiff Jack Ma is entitled to an award of $84.29 as interest upon interest checks which were wrongfully withheld from him by the defendant The Community Bank.

The Court HEREBY ORDERS judgment to be entered in favor of Mr. Ma and against defendant in the sum of $84.29 and that Mr. Ma be allowed all statutorily provided for costs.

SO ORDERED this 25th day of November, 1980, at Milwaukee, Wisconsin.

Robert W. Warren
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JACK MA,

Plaintiff,

vs. Case No. 73-C-427

THE COMMUNITY BANK,

Defendant.

MEMORANDUM AND ORDER

Several separate motions are presently before this Court. They will be reviewed seriatim.

The facts of this case can be summarized as follows. Plaintiff initially sought the return of thirty thousand dollars ($30,000) which he deposited with the defendant, Community Bank, on April 9, 1971. The deposit consisted of three savings certificates of deposit issued by the defendant. These certificates were stolen on September 28, 1971 and plaintiff promptly notified the defendant of the theft. Plaintiff allegedly demanded that the defendant return the money or reissue the certificates. Defendant stated that it would issue duplicates of the savings certificates if the plaintiff furnished to the defendant a satisfactory indemnity bond. The plaintiff refused.

The complaint sets forth seven causes of action and seeks damages for fraud, conversion, lost business opportunity, for the withholding of funds, damage to reputation, physical and mental pain and suffering and compensatory damages.

In January 1976, at his deposition, the plaintiff's identification was established. Subsequently, under Federal District Judge Myron L. Gordon's order of February 13, 1976 the plaintiff received the funds represented by the savings certificates. Prior to this time plaintiff apparently had not presented identification to the defendant when attempting to obtain the return of his funds. The defendant had refused to release the funds under these circumstances. Further facts are set forth in the following discussion of the individual motions.

MOTIONS FOR SUMMARY JUDGMENT

Both the plaintiff and the defendant have filed motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

A motion for summary judgment can only be entered when the pleadings, depositions, affidavits, and admissions filed in the case show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). The burden is on the moving party to show the lack of any genuine factual issues. Id.

The plaintiff states that summary judgment should be granted when no opposing affidavits are provided. This is not a correct interpretation of Rule 56. Although an adverse party may not rest upon the allegations or denials of his pleadings, the Court may look at depositions, answers to interrogatories and admissions of fact on file to determine if summary judgment is appropriate.

In this case, plaintiff has set forth seven causes of action. In the first cause of action, plaintiff alleges

a breach of contract and seeks return of the $30,000 represented by the savings certificates of deposit. Plaintiff has already received the funds under Judge Gordon's order of February 13, 1976 and therefore the request for return of the funds is moot.

The fifth cause of action is closely related to the issue of breach of contract. This cause of action alleges that the defendant fraudulently induced the plaintiff to deposit his monies by telling him that, if the certificates were lost, they would be immediately replaced by the bank. Plaintiff states in his affidavit and in his deposition that he was never told an indemnity bond would be required. Deposition of Jack Ma, January 14, 1976, p.45-46; Ma Affidavit, April 20, 1977, ¶ 13.

Defendant's Vice-President, Gerald Gerbers, states in his affidavit that he at no time told the plaintiff that the certificates could be reissued or that the principal amount could be paid without furnishing a bond of indemnity. Gerbers Affidavit, ¶ 11.

This Court believes that, absent a contractual agreement not to require an indemnity bond, the defendant had a right to demand an indemnity bond.

Plaintiff purchased these certificates on April 9, 1971. At that time his address, as reflected in the bank's records was Los Angeles, California. Plaintiff stated he called the bank on September 29, 1971 to inform the bank of the theft of the savings certificates of deposit. In a letter to the bank dated October 20, 1971, a person representing himself to be Jack Ma stated that the certificates had been stolen. The address in that letter was New York City. The bank mailed a letter to the New York City address informing the person purporting to be Jack Ma of the requirement of an indemnity bond.

The bank was not contacted again by this person until January 25, 1972. At that time, the alleged Jack Ma informed the bank that he was unable to obtain an indemnity bond because he was a foreign student. The address given in this letter was Astoria, New York.

The bank's attorneys were able to find a company that would issue the bond and so informed the alleged Jack Ma on February 23, 1972. This letter was sent to the New York City address.

In a letter dated February 26, 1972, the person purporting to be Jack Ma informed the bank that he had not received his interest check for the period ending October 9, 1971, although he had received the interest check for the subsequent period. In that letter, he also indicated that he wished to close the account on the coming due date of April 9, 1972. He offered to personally appear at the bank to close the account if necessary. Gerbers Affidavit, ¶ 10.

The subsequent sequence of events are somewhat unclear. It is clear that the alleged Jack Ma next wrote the bank on August 21, 1973 requesting a particular form and asking the bank to change his address from Los Angeles to his present address of New Jersey. Three subsequent letters were received by the bank.

The plaintiff did not furnish the bank with any identification or appear personally at the bank until January, 1976. At his deposition at that time, the alleged Jack Ma produced numerous records including his passport and visa, various cummunications between the bank and himself and other bank records. Ma Affidavit of February 28, 1977, ¶ 15.

The defendant bank was still skeptical. But Judge Gordon concluded that the plaintiff was Jack Ma to whom the

$30,000 was due on the particular savings certificates and ordered the funds given to him on February 13, 1976. In addition to the identification offered, Judge Gordon based his decision on the fact that the bank had only one customer named Jack Ma, and that a bank employee recognized the plaintiff in January, 1976 as a bank customer, although she did not know his name. Thus, the identity of the plaintiff was not clearly established until that time.

Prior to this time, the bank was in a difficult position. It only knew that the certificates were reportedly stolen and that a person purporting to be Jack Ma, although living in New York and not California as bank records initially indicated, wanted the funds represented by the certificates sent to him.

Absent a contractual agreement not to require an indemnity bond, it was not unreasonable to require such a bond. If the purported Jack Ma in New York was not the Jack Ma who owned the certificates, the bank would be doubly liable if it paid the imposter. 10 Am.Jur., Banks, § 465. The fact that interest checks were sent to the alleged Jack Ma does not mean the bank was also required to send the principal amount to the same address without requiring further assurances.

Section 403.804 of the Wisconsin Statutes provides that "the court may require security indemnifying the defendant against loss by reason of further claims on the instrument." The reasoning that allows the Court to require an indemnity bond also is applicable to the defendant bank in this case. The statute also does not specify that the amount of the bond equal the amount due on the instrument.

This Court concludes that a genuine issue of material fact exists as to whether or not there was a breach of the terms

of contractual agreement as the first cause of action alleges and whether or not the defendant made fraudulent representations to the plaintiff to induce him to purchase the certificates as the fifth cause of action claims. Thus, the motion for summary judgment with respect to these two causes of action must be denied.

The defendant has also challenged the validity of the remaining causes of action.

The second and fourth causes of action relate to the payment of interest to the plaintiff on the certificates. Plaintiff alleges that the defendant withheld interest payments from plaintiff from October 9, 1971 to May 10, 1973 and refused to pay compound interest. The plaintiff has admitted that he received all the interest checks due him. Ma Affidavit, January 31, 1977, ¶ 44-46; Deposition of Jack Ma, p.67.

The facts are unclear with respect to the second cause of action. A letter from the plaintiff to the defendant on January 25, 1972 states that the plaintiff received his interest check for the quarter ending January 9, 1972 but not for the prior quarter ending October 9, 1971. This is contrary to the allegations of the complaint.

Further, it is unclear when the plaintiff ultimately did receive these interest checks. Because plaintiff did receive the checks, the only issue remaining is whether or not the plaintiff is entitled to interest on the interest checks themselves if the defendant failed to mail said checks to the plaintiff in a timely fashion. Therefore, this Court denies defendant's motion for summary judgment with respect to the plaintiff's second cause of action.

Plaintiff also alleges that the defendant failed to pay compound interest. The certificates of deposit specifically

provided that interest was to be paid at the rate of 5% per annum and that the certificates were automatically renewable. Gerbers Affidavit, ¶ 2.

Defendant had no obligation to pay compound interest or any interest in excess of the contract rate of 5% per annum. Section 403.413(1) of the Wisconsin Statutes provides that the maker of an instrument "engages that he will pay the instrument according to its tenor at the time of his engagement."

Accordingly, the Court finds that the defendant's motion for summary judgment must be granted with respect to plaintiff's fourth cause of action.

Plaintiff's third cause of action essentially alleges that plaintiff suffered emotional distress when he attempted to deposit certain interest payments at the Oritani Savings & Loan Association and that finaicial institution refused to accept the checks because they were dated.

The Court finds that this cause of action must be dismissed because it fails to state a claim against the defendant. The checks were admittedly dated and plaintiff could have observed this before going to the savings and loan. Therefore, the defendant's actions were not the cause in fact of any emotional distress allegedly suffered by the plaintiff.

Further, plaintiff admits in his deposition that the savings institution cashed the checks after he agreed to allow the checks to clear before withdrawing funds. Deposition of Jack Ma, p.74. Any emotional distress suffered by plaintiff, resulted not from the financial institution's failure to cash the checks, but from having to make these specific arrangements. Accordingly, plaintiff's third cause of action is dismissed.

Plaintiff's sixth cause of action alleges that the defendant wrongfully withheld plaintiff's funds. The plaintiff's

seventh cause of action for conversion is essentially the same as his allegation of the wrongful withholding of funds. Conversion is defined in Blacks Law Dictionary as "any unauthorized act which deprives an owner of his property permanently or for an indefinite time."

Plaintiff has received his money. Any action he now has arises from defendant's alleged failure to reissue the certificates or return his funds on demand. This is not a different cause of action but arises because of the alleged breach of contract.

The Court finds that the sixth and seventh causes of action do not state a separate claim against the defendant and accordingly must be dismissed.

Plaintiff claims punitive damages and damages for the loss of business opportunities.

Punitive damages are not recoverable in Wisconsin for a mere breach of contract. White v. Benkowski, 38 Wis.2d 285 (1967), nor for all torts or crimes. Rather, such damages may be recoverable for those personal torts which are malicious, outrageous or a wanton disregard of personal rights "which require the added sanction of a punitive damage to deter others from committing acts against human dignity." Entzminger v. Ford Motor Co., 47 Wis.2d 751, 758 (1970).

The only contract cases in which the Wisconsin court has allowed punitive damages for fraud in the inducement to contract or for breach of contract have been actions for breach of promise to marry. Midcontinent Refrigerator Co. v. Straka, 47 Wis.2d 739 (1970); Luther v. Shaw, 157 Wis. 231 (1914).

Although it is well recognized under Wisconsin law that a breach of contract may also be a tort, White v. Benkowski, supra; Entzminger v. Ford Motor Co., supra, it is also clear that not all torts give rise to the awarding of punitive damages

This Court has found that punitive damages were eliminated in gross negligence cases in Wisconsin but are recoverable in certain cases involving intentional torts such as assault and battery, slander, libel and seduction. Walbrun v. Berkel, Civil No. 75-C-737, (E.D. Wis. December 15, 1976).

The facts of this case do not show the requisite conduct necessary to sustain the award of punitive damages.

Plaintiff also claims damages for lost business opportunities. To recover for such loss, the law is clear that the damages must be proved with reasonable certainty. Maslow Cooperage Corp. v. Weeks Pickle Co., 270 Wis. 179 (1955); Hammond v. Sandwich Mfg. Co., 146 Wis. 485 (1911).

Restatement of Contracts, § 331 which is applicable in Wisconsin states:

> (1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.

Plaintiff's own testimony indicates that any business he lost was highly speculative at best. Deposition of Jack Ma, pp.13i-14

Special damages for lost profits caused by breach of contract are recoverable only when it is clear they were fairly within the contemplation of the parties. Hammond v. Sandwich Mfg. Co., supra. Plaintiff here admits he did not inform the defendant of these lost opportunities.

Further, the party seeking to recover such damages must have exercised ordinary diligence to minimize them. Id. Clearly, the plaintiff has failed to do so in this case.

On the basis of the foregoing analysis, the Court finds that the plaintiff has not met his burden of proof in seeking summary judgment.

APPENDIX "C"

In his motion, plaintiff also sought sanctions against the defendant for alleged failure to obey orders of the Court and for failure to permit discovery. Plaintiff also sought an order prohibiting the defendant from introducing evidence and an order striking defendant's pleadings and dismissing the action. After examining the voluminous documents filed in this case, the Court declines to impose such sanctions. Plaintiff's motion for summary judgment, accordingly, must be denied.

Defendant's motion for summary judgment is denied with respect to plaintiff's first, second, and fifth causes of action and granted with respect to plaintiff's fourth cause of action. In addition, the Court finds that plaintiff's third, sixth and seventh causes of action must be dismissed for failure to state a claim against the defendant.

PLAINTIFF'S MOTION REGARDING REQUEST FOR ADMISSIONS OF FACT

In February, 1977, defendant moved the Court for an order that the facts set forth in items 2 through 14 of Defendant's Request for Admission of Facts be taken as admitted. This Request for Admission was mailed to plaintiff's counsel in New York on March 10, 1976. Plaintiff responded on April 14, 1976.

Plaintiff's responses to Requests No. 3 through 11 and 13 state that these requests deal with procedures arranged between the parties' counsel and that plaintiff therefore has little knowledge of these matters except through examination of the case file and discussions with his counsel. A similar response is given to Request No. 2. These responses are inadequate under Rule 36 of the Federal Rules of Civil Procedure which provides:

> ...An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

Plaintiff has denied Request No. 12 and has admitted Request No. 14 as required. With respect to Request No. 15, the defendant must be more specific as to what records and files were made available to the plaintiff and his counsel. Plaintiff will then have a basis for responding to this request for admission.

This Court finds that plaintiff has failed to comply with the requirements of Rule 36 and the matters in Request No. 2 through 11 and 13 are admitted. As to Request No. 15, defendant should specify within 10 days of this order which documents and files were made available to plaintiff and his counsel and examined by them, if they wish a response to this request. Plaintiff will then have 10 days to file his response.

DEFENDANT'S MOTION REGARDING PLAINTIFF'S ANSWERS TO DEFENDANT'S INTERROGATORIES AND REQUEST FOR ADMISSIONS

A.

Defendant has moved to dismiss plaintiff's answers to its interrogatories of December 20, 1976 or, in the alternative, for sanctions because of plaintiff's failure to answer such interrogatories.

Defendant's interrogatories relate to the subject matter of the testimony of plaintiff's expert witnesses. These experts, George H. Bilder and William G. Hrindac, were listed in plaintiff's letter of March 21, 1976 to Judge Myron L. Gordon. On March 4, 1977, pursuant to defendant's motion, this Court

ordered the plaintiff to serve his answers to the interrogatories. Such answers were made on March 24, 1977. Discovery was cut off by this Court as of May 23, 1977.

An examination of plaintiff's answers shows that they are generally evasive or incomplete. Rule 37(a)(3) provides that "an evasive or incomplete answer is to be treated as a failure to answer."

In his answers for example, plaintiff states that the experts "are expected to testify about the various actions of The Community Bank in this case." Plaintiff's Answers to Interrogatories, p.1. Plaintiff further states he is unable to provide the defendant with the opinions of the experts because one expert has been out of the New York area for over a month.

These answers are unacceptable. The interrogatories were served in December, 1976. Plaintiff had ample time to contact his expert and obtain this information. Plaintiff also promised to supplement his answers to these interrogatories but has failed to do so.

Plaintiff has presented no adequate justification for failure to comply with the Court's order of March 4, 1977. Accordingly, the defendant's motion for sanctions is appropriate.

The defendant requests that the plaintiff be prohibited from introducing expert testimony at trial or that the action be dismissed. The Court does not believe that the harsh sanction of dismissal is appropriate under these circumstances.

As the Court stated in Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231, 234 (7th Cir. 1973), "the extreme sanction of default or dismissal must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited, and that where an alternative, less drastic, sanction would be just as effective it should be utilized."

APPENDIX "C"

Therefore, the Court holds that plaintiff shall be precluded from producing expert testimony at trial. The Court further orders that the plaintiff pay defendant's reasonable costs. including attorney's fees, of this motion relating to plaintiff's failure to answer defendant's interrogatories.

B.

In conjunction with the motion relating to answers to interrogatories, the defendant has also filed a motion with respect to its request for admission of fact dated January 6, 1977

Such request was neither admitted or denied by the plaintiff as required by Rule 36 of the Federal Rules of Civil Procedure.

This rule provides in part:

> The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall farily meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

Plaintiff has failed to specify what parts of the transcript are "a true and correct copy" of his testimony and what parts are erroneous.

Therefore, this Court holds that the Request for Admission of Fact dated January 6, 1977 is hereby admitted.

PLAINTIFF'S MOTION TO REOPEN DISCOVERY

Plaintiff has moved the Court for an order reopening discovery to permit the plaintiff to conduct four depositions and to obtain certain documents.

On February 23, 1977, at the pretrial conference, this Court set a firm discovery deadline of May 23, 1977. Plaintiff did not object to this deadline. Subsequently, after the deadline had passed, plaintiff attempted to take the deposition of Claude C. Philippe. The defendant objected.

The Court issued an order stating that discovery was foreclosed and that leave of the Court would have to be sought before any additional discovery was undertaken. Plaintiff then filed this motion stating that there were good reasons for the delay:

1. the plaintiff had previously been forced to expend great sums of money to obtain discovery from the defendant;

2. the plaintiff had hoped that this Court would make a determination on his motion for summary judgment, which has been pending before this Court since January, 1977, and thus obviate the need for further discovery; and

3. as the defendant is well aware, expert witnesses are expensive, and plaintiff, who is of limited means, may not be able to afford to pay an expert witness fee. Plaintiff's Reply Brief, September 19, 1977, p.2.

Plaintiff further alleges that certain documents were not supplied by the defendant and that plaintiff's attorneys only obtained portions of these documents from the Federal Deposit Insurance Corporation (FDIC) in July, 1976. Plaintiff now seeks to obtain these documents.

The Court has carefully examined plaintiff's reasons for requesting the reopening of discovery and finds them unpersuasive.

This case has been pending since 1973 and a trial was originally set for mid-1976 in Judge Gordon's court. The parties have had ample tome to complete discovery.

APPENDIX "C"

Plaintiff alleges that certain documents were not received until July, 1976, but this does not adequately explain why depositions were not noticed until fully twelve months later - two months after the discovery cutoff set by this Court.

The Court finds that no "manifest injustice" would occur if plaintiff's motion were denied. Plaintiff has had adequate discovery opportunities during the past four years. Therefore, the Court holds that plaintiff's motion to conduct depositions and obtain particular documents from these deponents must be and is hereby denied.

PLAINTIFF'S MOTION FOR TRIAL BY JURY

On July 25, 1977, plaintiff filed a motion for an order granting a trial by jury pursuant to Rule 39(b) of the Federal Rules of Civil Procedure. Plaintiff had previously filed a similar motion which was denied by Federal District Judge Myron L. Gordon on May 20, 1976.

Under Rule 38, there is an automatic waiver of the right to trial by jury unless a timely demand for a jury trial is made. McNabb v. Kansas City Life Ins. Co., 139 F.2d 591 (8th Cir. 1943). Under Rule 39(b), the Court in its discretion may order a trial by jury despite such waiver.

Plaintiff claims that the untimeliness of his demand for trial by jury was due to a conflict of interest of plaintiff's prior attorneys in this action.

A review of the history of this case shows that plaintiff was represented by the Milwaukee law firm of Brady, Tyrrell, Cotter & Cutler when the original complaint was filed in August, 1973. No demand for a jury trial was made at that time. A verified amended complaint signed by the plaintiff

was filed on April 25, 1975. In that complaint, plaintiff's present New York attorneys were listed as counsel. Again, no jury demand was made.

On January 28, 1976, plaintiff's demand for a jury trial was filed. This was almost two and one-half years after the original complaint was filed and nine months after the verified amended complaint was filed. Plaintiff did not file a motion for trial by jury until March 29, 1976.

Although plaintiff alleges a conflict of interest involving his initial attorneys, the Court notes that the law firm of Quarles & Brady did not come into existence under that name until February of 1974 - after the plaintiff's initial complaint was filed.

Plaintiff indicates that his present attorneys first received notice in July, 1976 that Quarles & Brady represented First National Corporation, the parent company of the defendant, Community Bank. Although notice was received in July, a motion for a jury trial was not filed until some twelve months later.

The Court finds plaintiff has failed to give adequate justification for his failure to make an earlier demand for a trial before a jury. Therefore, the Court declines to exercise its discretion to grant a trial by jury in this case. Plaintiff's motion for a trial before a jury must be and is hereby denied.

So ordered this 21st day of October, 1977 at Milwaukee, Wisconsin.

Robert W. Warren
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JACK MA,

Plaintiff,

v. No. 73-C-427

THE COMMUNITY BANK,

Defendant.

ORDER

The defendant has moved for an order requiring the plaintiff to appoint local counsel under local rule 2.04. The plaintiff has opposed such motion and has moved to have defendant's counsel disciplined by the court and held in contempt under Rules 11 and 56, Federal Rules of Civil Procedure.

The court has examined the motions and believes it is amply advised in the premises.

Therefore, IT IS ORDERED that the defendant's motion is granted and the plaintiff's motion is denied. The appearance of local counsel on behalf of the plaintiff should be formally filed by August 24, 1976.

Dated at Milwaukee, Wisconsin, this 29 day of July, 1976.

Myron L. Gordon

U.S. District Judge

APPENDIX "D"

Unpublished Per Curiam Order

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinos 60604

June 8, 19 82.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

JACK MA, a subject of the Republic of China,
Plaintiff-Appellant,

No. 80-2806 vs.

THE COMMUNITY BANK, a Wisconsin banking corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 73-C-427
Judge Robert W. Warren

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, and REMANDED with directions, in accordance with the order of this Court entered this date. Each party is to bear its own costs on appeal.

APPENDIX "E"

FILED
JULY 20, 1982
(confirmed by telephone)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JACK MA,

Plaintiff-Appellant,

-vs-

THE COMMUNITY BANK,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Case No. 80-2806

I. Notice is hereby given that JACK MA, the plaintiff-appellant in this case, hereby appeals to the Supreme Court of the United States from the Order of the United States Court of Appeals for the Seventh Circuit dated June 8, 1982.

This appeal is taken pursuant to Title 28 U.S.C. Section 1254(2) and (3).and Rule 10(2) of the Rules of the United States Supreme Court.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States.

III. The following questions are presented by this appeal:

(1) Whether the Court was correct in reaching the issue of entitlement to damages before examining the question of liability based on bad faith and fraud and conversion of of defendant-appellee.

(2) Whether the finding that plaintiff-appellant is not entitled to punitive damages is the same as the granting of zero damages after a finding of entitlement to damages resulting in precluding review on this issue pursuant to Wisconsin law.

(3) Whether the Court was correct in denying plaintiff legal fees and litigation costs where a defendant is found guilty of fraud and bad faith and caused a case to become

extraordinarily lengthy due to defendant's refusal to cooperate with discovery.

(4) Whether the Court abridged plaintiff's rights to choice of legal counsel in the absence of a shewing that plaintiff's nonresident counsel needed to obtain assistance of local counsel and whether such an order was frivolous in light of the fact that the District Court did not order plaintiff to replace local counsel after she withdrew. Whether the Court of Appeals erred in affirming the lower court's application of Local Rule 2.04 to plaintiff when the rule specifically applies to nonresident counsel.

(5) Whether exigent circumstances comprising of ineffective counsel by reason of a conflict of interest because of conspiracy with plaintiff's adversary is sufficient grounds for granting plaintiff's request for a jury trial where said request was not timely filed, especially where the defendant would not be unduly prejudiced.

Jack Ma

Jack Ma
Plaintiff-Appellant,
Pro Se

Dated: July 19, 1982

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